IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6285 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DIPAK MEHTA - Petitioner(s)

Versus

SHYAM CORPORATION - THRO' PRESIDENT BRIJESHKUMAR PODDAR & 1 - Respondent(s)

==========

Appearance :

MR AMIT V THAKKAR for Petitioner No(s).: 1.

RULE SERVED BY DS for Respondent No(s).: 1,2.

==========

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 09/08/2005

ORAL JUDGMENT

1. Instant petition under Articles 226 and 227 of the Constitution of India is filed against the

order dated 25.10.2002 and 30.10.2002 recorded below Ex.17 and 20 respectively, Annexures A and B to the petition, in Special Civil Suit No.18 of 2002, by the learned 4th Joint Civil Judge (S.D.)., Surat, by which the applications filed by the petitioner seeking adjourning to file written statement and also the application file to take on record the written statement filed by the petitioner came to be rejected.

2. Respondent No.1/original plaintiff filed suit for declaration and injunction against the present petitioner/original defendant No.2 and respondent No.2 herein being Special Civil suit No.18 of 2002 before the 4th Joint Civil Judge (SD), Surat. The said matter was adjourned for filing written statement on 25.10.2002. However, on that day because of the eye operation of the petitioner's advocate's brother, he had to rush to Vadodara and under such circumstances beyond the control, petitioner's advocate could not

remain present in the court. Besides this, father of the petitioner's advocate was ill and was hospitalized and therefore the petitioner's advocate could not study the relevant documents and draft the same and further some of the relevant documents were also not found and as such the written statement was not ready for filing on 25.10.2002. The said ground was also specifically stated in the application. Therefore he sent an application Ex.17 (Annexure A) seeking adjournment for filing written statement stating the relevant grounds therein. The said application of the petitioner seeking adjournment for filing written statement came to be rejected by the trial court on the ground that as per the amended Civil Procedure Code ('the Code' for short), no further time can be given.

3. Immediately thereafter on 28.10.2002 i.e., after three days the petitioner produced on record the written statement i,e., reply to the

plaint and injunction application along with the application Ex.20 (Annexure B) for opening the stage for filing the written statement/reply and for taking the same on record. The petitioner specifically mentioned the circumstances in which the written statement was not produced and the circumstances in which the stage of the petitioner for filing the reply came to be closed by the trial court. However, the trial court did not consider the application of the petitioner and by order dated 30.10.2002 said application came to be rejected on the ground that as per the amended provisions of the Code, the court cannot give extension of more than 90 days for filing the written statement which has given rise to the present petition.

4. This Court has considered the submissions advanced by Mr. Amit Thakkar, learned advocate for the petitioner, perused the impugned orders as well as the judgment cited at the bar.

5. So far as the factual matrix is concerned, with regard to the filing of the suit by respondent No.1 against the petitioner who is defendant No.2 as well as respondent No.2 in the suit is not in dispute. The petitioner could not file written statement in time. Statutory provisions contained under Order 8 Rule 1 of the Code put embargo upon the Court to accept the written statement if it is filed after 90 days from the date of service of the summons.

6. In the case of Kailash v. Nankhu and others, (2005) 4 SCC 480 a Three Judge Bench of the supreme Court has held that Order 8 Rule 1 and the proviso thereto as amended by Act 22 of 2002 with effect from 1.7.2002 has been held directory in character and not mandatory. The Supreme court has further held that though they cast an obligation on defendant to file a written statement within the time prescribed therein, the

provisions do not deal with nor specifically take away the power of the court to take a written statement on record, though filed beyond the time as provided for therein. However, the Supreme Court has stressed that the fact that Order 8 Rule 1 and proviso thereto as amened have been held to be directory may not be understood as nullifying the entire force and impact, the entire life and vigour, of the provisions in its amended form. In the said judgment the Supreme Court has elucidated guidelines for the courts to exercise discretion in this regard in detail.

7. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, according to this Court, the reason assigned by the learned trial Judge for rejecting the application filed by the petitioner for permitting him to file written statement after the stage was closed was not cogent and convincing. On the contrary, the

petitioner by submitting applications at Ex.17 and 20 assigned convincing reason for not filing written statement in time stating that he could not file the written statement in time as his father and brother was ill, which, according to this Court, was not only convincing but plausible as well. Therefore, according to this court, the impugned order deserves to be quashed and set aside by granting the applications Ex.17 and 20 and thereby permitting the petitioner to file written statement.

8. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs the result of which is that the orders dated 25.10.2002 and 30.10.2002 passed below ex.17 and ex.20 in Special Civil Suit No. 18 of 2002 by the learned trial Judge are hereby quashed and set aside and both the applications are allowed. The petitioner is permitted to file the written statement and the learned trial Judge

is directed to accept and exhibit the same.

9. The amount of Rs.5,000/- deposited by the petitioner before this court pursuant to the order dated 14.7.2003 passed by this Court towards the probable costs of the other side shall be refunded to the petitioner on due verification as the other side has not filed appearance in the matter.

10. Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

.....

(karan)